Supreme Court, U.S.
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CLERK

86-294

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO._____

GORDON C. PERDUE AND ELIZABETH T. PERDUE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PRESENTED BY:

RICHARD L. POWELL

ATTORNEY AT LAW

POST OFFICE BOX 11602

MARTINEZ, GEORGIA 30907

(404) 860-5029

COPY

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QUESTIONS PRESENTED FOR REVIEW

Whether or not Gill v. United States, 641 F.2d 195 (5th Cir. 1981) should be overruled because of the conflicts between the various circuits involving actions under the Federal Tort Claim Act?

PARTIES TO THE PROCEEDING AND INTERESTED PERSONS

Gordon C. Perdue, Petitioner

Elizabeth T. Perdue, Petitioner

United States of America, Respondent

Richard L. Powell, Attorney for Petitioners

Henry L. Whisenhunt, Attorney for Respondent

Honorable Dudley H. Bowen, United States District Court for the Southern District of Georgia, Trial Judge

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and is printed in Appendix A hereto, infra, page A-16. The judgment of the United States Court of Appeals for the Eleventh Circuit is printed in Appendix A hereto, infra, page A-21. The judgment of the United States District Court for the Southern District of Georgia is printed in Appendix A hereto, infra, page A-22.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 27, 1986. (Appendix A infra, page A-21). A timely petition for rehearing was denied on April 7, 1986 (Appendix A, infra, page A-26). The jurisdiction of the Supreme Court is involved under 28 U.S.C. §1254.

STATUTES INVOLVED

This case involves the Federal Tort Claims Act, 28 U.S.C. §1346 and 28 U.S.C. §§2671 et. seq, the complete texts of which are set out in full in Appendix A.

STATEMENT OF THE CASE

The case is a negligence action filed by plaintiff against defendant under 28 U.S.C. §2671 et. seq. (Federal Torts Claim Act, hereinafter referred to as FTCA) in which plaintiffs allege that as a result of the neligence of defendant's agent, plaintiff, Elizabeth T. Perdue, sustained personal injuries which required multiple surgical procedures and which will require medical treatment in the future. Plaintiff, Elizabeth T. Perdue, incurred medical expense and will incur future medical expense; plaintiff suffered disfigurement, temporary total disability and permanent partial disability; plaintiff suffered a permanent diminution in her ability to labor and earn money in the future, and lost wages in the past and will lose wages in the future; plaintiff suffered excruciating physical and mental pain and suffering, which

will continue into the future; plaintiff suffered total destruction of her motor vehicle; and plaintiff, Gordon C. Perdue, suffered the loss of the society, companionship, consortium, and enjoyment of his wife, Elizabeth T. Perdue.

Since this Motion For Rehearing deals with the Panel's application of the bar to recover under the Federal Torts Claim Act after receipt of compensation under the Federal Employees Compensation Act, the only facts addressed will be those involving the FECA defense.

On May 7, 1981, David Kesner (Kisiner), a member of the United States Army assigned to Company E, 1st Battalion, 2nd Student Training Brigade, Fort Gordon Georgia, attended a unit organization day party (formerly known as battalion beer parties) at Mirror Lake, Fort Gordon, Georgia. At said party, Kesner consumed alcoholic beverages purchased with government funds from the morale support fund. After about an hour, Kesner and companions drove away from

the Mirror Lake recreation area. Kesner failed to obey a stop sign and crashed into Appellant's vehicle causing Appellant's injuries. After the collision, Kesner's blood/alcohol level was determined to be 95.6 mg/dl.

The Army conducted a line of duty investigation concerning Kesner's status. Kesner was determined to have been in line of duty at the time of the collision.

On May 7, 1981, plaintiff, Elizabeth T. Perdue, was employed as a civilian employee assigned to the Communication Electronics Board at Fort Gordon, Georgia, as an Editorial Clerk. Her normal work day is from 7:30 a.m. to 4:00 p.m.

On May 7, 1981 plaintiff reported to work on time. She worked through her lunch hour. She was released from work at approximately 3:30 p.m. to go to her home in Wrens, Georgia, to pick up her daughter and take her to a doctor's

appointment. At the time plaintiff left her work at the Communication Electronics Board, she had completed her work day. She had been released from duty by her supervisor legally. At the time she left the Communication Electronics Board she was not performing any of her employment duties and was purely on personal business.

After completing her work day and being relieved of duty, and while on her own personal business of driving to Wrens, Georgia, to pick up her child, plaintiff was injured in a collision with the vehicle driven by Kesner at the intersection of Range Road and North Range Road, Fort Gordon, Georgia.

On May 8, 1984, plaintiff's supervisor went to the hospital where plaintiff was a patient. At the time plaintiff was heavily sedated due to her injuries. On that date her supervisor, Vicky M. Overstreet, now Martin, filed a Notice of Traumatic Injury on behalf of Ms. Perdue. While

at the hospital on her second visit, Mrs. Martin obtained plaintiff's husband's signature on the Notice of Injury form.

Plaintiff's supervisor, Mrs. Martin, filed the claim on plaintiff's behalf after conferring with Mrs. Way at the Civilian Personnel Office at Fort Gordon, Georgia. Mrs. Martin did not believe the injury was job related. However, when she conferred with CPO, Mrs. Way informed her that because plaintiff was driving home from work on post, plaintiff would receive worker's compensation.

Subsequently, plaintiff's supervisor came to see plaintiff in the hospital, while plaintiff was heavily sedated for pain, and obtained plaintiff's signature on a document requesting that she go on leave without pay status so that she could obtain compensation benefits. Several of the documents signed by plaintiff were signed during the many months while she was undergoing surgical procedures for her injuries.

At no time while benefits were being applied for on plaintiff's behalf did anyone advise plaintiff that her acceptance of those benefits would preclude her from maintaining this action.

FEDERAL QUESTIONS

Plaintiffs filed their complaint on or about February 14, 1983 and defendant was served with Complaint, Interrogatories and Notice for Production of Documents. Defendant was granted an extension of time within which to answer or otherwise plead up to and including April 25, 1983. On April 29, 1983, defendant filed a Motion to Dismiss for Failure to State Claim and for Lack of Jurisdiction over the subject matter, a Motion for Stay of Discovery, and a brief and memorandum in support of both motions. Plaintiff was allowed an extension of time within which to file responses to defendant's motions up to and including July 3, 1983.

On May 31, 1983, the Court granted defendant's Motion to Dismiss, but said order was

vacated on June 1, 1983, and the case was reopened. On June 3, 1983 plaintiff filed a Motion for Stay of Consideration of Defendant's Motion to Dismiss pending limited discovery and said motion was granted. On September 23, 1983, defendant filed answers to plaintiff's Interrogatories. On January 11, 1984 the Court ordered preparation and filing of a joint status report on or before February 25, 1985. Said report was filed February 25, 1985.

On March 4, 1985, plaintiffs filed their brief in opposition to defendant's Motion to Dismiss. Defendant responded to plaintiff's brief on April 10, 1985. On May 20, 1985, the Court dismissed plaintiffs' case with prejudice and judgment was entered in accordance with said order. Plaintiffs filed their Notice of Appeal on June 3, 1985. The record on appeal was filed with the United States Court of Appeals for the Eleventh Circuit on June 27, 1985.

Appellants filed their brief on August 2, 1985 and Appellee filed its response on August 30, 1985. Appellants subsequently filed a supplemental brief on September 17, 1985. Oral argument was held before the Panel of the Court on December 12, 1985, and the Panel of the United States Court of Appeals for the Eleventh Circuit issued its Per curiam, unpublished decision on January 27, 1986, affirming the decision of the United States District Court dismissing the Appellant's Complaint as to personal injury claims under the FTCA and remanding the case to district court so that Appellants may proceed with their property damage claims under the FTCA.

FEDERAL JURISDICTION

The United States District Court for the Southern District of Georgia had jurisdiction of

the instant case under the Federal Torts Claim Act.

REASONS FOR GRANTING WRIT

Appellants contend that they are entitled to a Writ of Certiorari before this Court because their appeal involves one or more questions of exceptional importance concerning whether or not receipt of Worker's Compensation Benefits under the circumstances of this case bars their cause of action under the Federal Torts Claim Act, and whether or not Gill v. United States, 641 F.2d 195 (5th Cir. 1981) should be overturned.

Further, the Panel was barred by the Gill decision even if the various members disagreed with the result of applying that ruling to the facts in this case.

Additionally, the Panel misinterpreted the facts in the present case. The first application for compensation was prepared by Mrs. Martin and

signed by Mr. Perdue. The second form was signed by Mrs. Perdue while heavily under the influence of pain killing medication.

28 U.S.C.A. §1346(b) gives an individual the right to file a tort claim against the United States as the employer of someone who injures that individual. The FECA, however, is the exclusive remedy for employees who sustain an injury or die as a result of personal injury sustained while in the performance of duty. As the facts set out, Appellant was not injured on the job, nor did she voluntarily apply for FECA benefits. There is no substantial question as to FECA coverage.

The Act grants the Secretary of Labor exclusive authority to administer FECA and to decide all questions arising under FECA and such decisions are not subject to judicial review. There has been no written decision by the Secretary of Labor or his designee that FECA

applies. Appellant has received benefits as a result of her supervisor's application.

This Court and the lower court have held that Gill v. United States, supra, precludes subsequent FTCA actions as well as judicial review of whether FECA actually should apply Appellants contend that the decision in Gill should be overturned particularly in light of various decisions in other circuits which have construed the provisions of the FECA and the Longshoremen and Harbor Worker's Compensation Act (LHWCA) and allowed claims to be asserted under the FTCA.

In Martin v. United States, 566 F.2d 895 (4th Cir. 1977) the plaintiff voluntarily accepted FECA benefits but later filed a tort claim against the United States claiming that said benefits had been erroneously awarded and thus did not affect her right to bring a tort action because she was not injured within the scope of her employment. While the lower court

held for the defendant, the higher court reversed and remanded and held that "plaintiff's acceptance of compensation payment did not as a matter of law, preclude her from pursuing tort remedies." Smith v. Service Contracting, Inc., 236 F. Supp. 492 (1964) held similarly and stated that there must be a conscious attempt to elect one remedy and waive all rights to the other. As the facts, supra, indicate there was no conscious election on the part of plaintiff.

Freeman v. Norfolk and Western Railroad Co., 596 F.2d 1025 (4th Cir. 1979) voices a similar opinion as that stressed in Martin, supra. Both lower and higher courts held that an employee is not barred from filing a tort claim just because he accepted worker's compensation.

In addition, plaintiff is not suing her employer after already having received compensation from it. Plaintiff is suing the employer of the driver of the vehicle

which struck her. In Wallace v. United States, 669 F.2d 947 (1982) the Court of Appeals stated:

> Even if we assume that Wallace's injuries were work-related and compensable exclusively under FECA, FECA bars only the Wallaces' claim against the United States, as Wallaces' employer. It does not bar the Wallace's claim against the United States as the substitute defendant for other program participants...

FECA cannot preclude claims against the United States as substitute defendant for acts or omissions of third parties, or its servants, under the "dual capacity" doctrine. See also, Wright v. United States, 717 F 2d 254 (6th Cir., 1983).

There has been no conscious election on the part of the plaintiff to choose one remedy and waive all rights to the other. The FECA, in the situation at hand, bars plaintiff's claim against the United States as plaintiff's employer. It does not bar plaintiff's claims against the

United States as the employer of the third party who injured plaintiff, Elizabeth T. Perdue. The dual capacity doctrine clearly provides for a distinction in situations such as this.

The fact that plaintiff accepted compensation under FECA should not be troublesome to the court. Receipt of these benefits cannot point to a conscious attempt to give up the tort claim. The fact that defendant's agents took the initiative in applying for and making these payments argues against the element of choice.

Fairness would require that any recovery by plaintiffs in the tort case be reduced by the amount of compensation already received. This would prevent any double recovery and avoid any unjust enrichment to the plaintiffs. See: Martin, supra; Smith v. Service Contracting Inc., supra; Freeman v. Norfolk and Western Railway Co., supra; Twin City Federal Savings and Loan Association v. Transamerican Insurance

Company, 491 F.2d 1122 (8th Cir. 1974); United States v. Brown, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed 139 (1954), United States v. Brooks, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed 1200 (1949).

Appellants contend that the decision in Gill, supra, is clearly erroneous in that other courts have taken the stand that an administrative decision does not take away the rights of a citizen to turn to the judicial system. To claim that any case where there is a "substantial question" as to the applicability of FECA is automatically unreviewable by the Court is to afford the administration excessive power and interferes with the process of checks and balances envisioned for our legal system.

The Panel, in its opinion, misinterpreted the facts relating to the initiation of the FECA benefits. The Panel determined that Perdue sought to qualify for FECA benefits. In reality the FECA benefits arose through determination by others. Mrs. Martin contacted CPO to determine

out the form needed to report the injury. She felt the injury was not job related. Mrs. Way at CPO instructed Mrs. Martin that simply because it happened on post, the injury was covered. She instructed Mrs. Martin as to what to do and the forms to complete. Mrs. Martin prepared the form, and without solicitation by Appellant, delivered the forms to Mr. Perdue at the hospital. Mrs. Martin informed Mr. Perdue that the injury was covered. She procured his signature. Mrs. Perdue was not in a condition to know what was happening. Later, Mrs. Martin came back and obtained Mrs. Perdue's signature while she was dopey from pain killing medication.

In its opinion the Panel pointed out the unreasonableness of the Gill decision. Under Gill, even if the award of FECA benefits is a "cynical sham" designed to avoid potentially more extensive liability under the FTCA, the Court is bound by the Secretary's determination. In

reality, as in this case, that determination is not made by the Secretary, but by someone like Mrs. Way. In considering whether Appellant is barred, a more reasoned decision would be that made in Martin v. United States, supra, or a decision based on whether Appellant was actually entitled to benefits under the law.

There is a substantial conflict between the Circuit applying the Fifth Circuit case of Gill and other Circuits. Appellant urges the Court to grant a Writ of Certiorari to consider the Gill decision in light of the other Courts' decisions.

CONCLUSION

Appellants are entitled to the granting of a Writ of Certiorari because their appeal involves a question of exceptional importance concerning whether or not Gill v. United States should be overturned.

Plaintiff was not injured on the job, so clearly there was no substantial question as to FECA coverage. Plaintiff did not file for worker's compensation benefits herself. Said application was filed on her behalf by her supervisor.

Various courts in other circuits have construed the provisions of the FECA and the LHWCA and allowed claims to be asserted under the FTCA contrary to the decision in Gill, supra. In addition, the "dual capacity" doctrine would allow plaintiffs to assert their federal tort claim.

Appellants contend that under the circumstances of their case and in light of the decisions of various courts, the decision in Gill is clearly erroneous, and they should be able to pursue their cause of action under the FTCA.

For the foregoing reasons, this Petition For Writ of Certiorari should be granted.

Respectfully submitted, this 3rd day of July, 1986.

s/

Richard L. Powell

Attorney for Petitioners

Post Office Box 11602

Martinez, Georgia 30907

(404) 860-5029

VERIFICATION

I, RICHARD L. POWELL, a member of the Bar of the Supreme Court of the United States and the attorney of record for Respondent in the above entitled matter.

I have read the foregoing petition and know the contents thereof.

I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct. Executed on the 3rd day of July, 1986 at Augusta, Georgia.

/s/
RICHARD L. POWELL
ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

This is to certify that I have this day served Mr. Henry L. Whisenhunt, Jr., Attorney for Respondent at Post Office Box 2017, Augusta, Georgia 30903, in the foregoing matter with a copy of the within and foregoing instrument by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 3rd day of July, 1986.

s/
Richard L. Powell
Attorney for Petitioners

APPENDIX

I certify that all of the apperdices attached to the Petition For Certiorari filed herein are true copies of what they purport to be.

s/
RICHARD L. POWELL

A

APPENDIX

APPENDIX

28 U.S.C. §1346

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court for the Virgin Islands, shall have exclusive jurisdiction of civil actions or claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2671

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the

military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard, while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 U.S.C. §2672

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of this office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000.00 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against

the United States, any such award, compromise settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise or settlement in an amount of $2,500.00 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500.00 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter

The acceptance by the claimant of any such award, compromise or settlement shall be final

and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. §2673

Repealed.

28 U.S.C. §2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only

punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

28 U.S.C. §2675

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it

is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency or upon allegation and proof of intervening facts relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 U.S.C. §2676

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C §2677

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

28 U.S.C. §2678

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any

award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000.00 or imprisoned not more than one year, or both.

28 U.S.C. §2679

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by an employee of the Government of any motor

vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate supervisor or to whomever was designated by the head of his department to receive such papers and such person

shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within

the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State Court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. §2680

The provisions of this chapter and section 1346(b) of this title shall not apply to-

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, §13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-8445

GORDON C. PERDUE Plaintiffs-Appellants,

ELIZABETH T. PERDUE

versus

UNITED STATES OF AMERICA Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(January 27, 1986)

Before VANCE and HENDERSON, Circuit Judges, and

LYNNE*, Senior District Judge.

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*Honorable Seybourn H. Lynne, Senior U. S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

Plaintiff-Appellant Elizabeth Perdue worked as a civilian employee for the United States Army at the Communications Electronic Board at Fort Gordon, Georgia. While driving home one afternoon after work, she was struck by a car operated by a soldier stationed on the Army base. The soldier, David Kesner, was returning from a party on the Fort Gordon military reservation. There is some confusion and dispute as to whether Kesner had prior permission to operate an automobile on the reservation at the time and place in issue. For the purposes of this appeal, however, a resolution of this dispute is not necessary because the Army determined through an internal investigation that Kesner was present for duty at the time of the collision and was acting in the line of duty.

Because she suffered extensive injuries, Mrs. Perdue was transported to a hospital, where she was visited the next day by her work super-

visor. In the supervisor's presence Mrs. Perdue signed a form relating to the traumatic injury so that she might apply for compensation benefits while away from work. On a later visit, Mrs. Perdue's husband, who also is a plaintiff-appellant, signed another form for a similar purpose. These forms were submitted by the supervisor, who was informed that Federal Employee Compensation Act (FECA), 5 U.S.C. §§8101-8194, benefits would be available because Mrs. Perdue was on her way home from work. The supervisor then submitted more documents to Mrs. Perdue in which she requested that she be placed on "leave without pay" status so that she could receive the approved compensation. After receiving these compensation payments for a period of time, the Perdues filed suit against the government in the United States District Court for the Southern District of Georgia seeking damages for personal injuries and property loss under the Federal Tort Claims Act

(FTCA), 28 U.S.C. §§1346, 2671-80.

The government filed a motion to dismiss the Complaint for failure to state a claim and for lack of jurisdiction over the subject matter. The district court granted the motion and dismissed the complaint, holding that FECA was the Perdue's exclusive remedy against the United States once the Secretary of Labor (Secretary) determined that Mrs. Perdue's injury was within its coverage. See 5 U.S.C. §8116(c). Furthermore, the court concluded that it could not review that conclusion and was bound by the Secretary's decision. See, Gill v. United States, 641 F.2d 195 (5th Cir. Unit A 1981) (per curiam)[1]; 5 U.S.C. §§8128(b)(1), (2). The district court therefore found it had no jurisdiction and ordered the case dismissed with prejudice.

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[1]In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

In Gill, the court held that even if the award of FECA benefits is a "cynical sham" designed to avoid potentially more extensive liability under the FTCA, a court is bound by the Secretary's finding of coverage under the FECA. Gill, 641 F.2d at 197; 5 U.S.C. §§8128(b)(1), (2). The Perdues attempt to distinguish this apparently dispositive holding by arguing that acceptance of FECA benefits without the realization that such action was a binding election of exclusive remedies should not preclude their recover under the FTCA. They also assert that the Secretary has not made a formal, written determination that FECA applies to Mrs. Perdue's injury.

Unfortunately, for the Perdues, these arguments are foreclosed. Gill controls this case and mandates that we affirm the district court's judgment that FECA provides the exclusive remedy once the claimant seeks its benefits and the Secretary concludes that the injury fell

within the coverage. Mrs. Perdue, as well as her husband, signed the necessary forms and thereby requested the government to pay workers' compensation benefits. They thus sought to qualify for FECA coverage,[2] a request that was granted when the Secretary disbursed funds to them.[3] Gill commands that their decision precludes subsequent FTCA actions as well as judicial review of whether FECA actually should apply. Gill, 641 F.2d at 197.

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[2]We therefore need not pass on whether voluntary acceptance of payments would bar any subsequent tort actions. See, e.g., Martin v. United States, 566 F.2d 895, 898-99 (4th Cir. 1977).

[3]The Perdues contend that no formal, written determination was made by the Secretary. Such formalism is unnecessary. The Secretary's decision to pay FECA benefits after having been requested to do so can be viewed as nothing else but a decision that coverage exists under the FECA.

Although we agree that Mrs. Perdue's application for and acceptance of FECA benefits bars a recovery for her personal injuries under the FTCA, we disagree with the district court's dismissal of the entire complaint. The Perdues also sued for property damage as well as personal injury. Record on Appeal. Vol. 1, at 4. The district court apparently overlooked this claim and dismissed the entire suit with prejudice. FECA is similar to state workers' compensation statutes and seeks the same goals. Gill, 641 F.2d at 197. Section 8116(c) is designed to avoid double recover for personal, work-related injury by providing that FECA is the exclusive remedy for injuries within its coverage. See id. Application for and receipt of FECA benefits does not bar a suit for property damages in the same incident that triggered FECA coverage. The case must be remanded to the district court so

that the Perdues may proceed with their property damage claims under FTCA.

AFFIRMED in part and REMANDED in part.

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

GORDON C. PERDUE	)	CV 183-059
ELIZABETH T. PERDUE	)	CV 183-069
-VS-	)	
UNITED STATES OF AMERICA)		USCA 85-8445

O R D E R

The judgment of this Court in the above-styled action having been AFFIRMED in part and REMANDED to said District Court for further proceedings by the United States Court of Appeals for the Eleventh Circuit,

IT IS HEREBY ORDERED that the judgment of the Eleventh Circuit is made the judgment of this Court.

IT IS FURTHER ORDERED that the Clerk is directed to reopen this case and place it on the active docket of this Court. The Clerk will schedule a settlement conference as soon as practicable.

SO ORDERED, this 23rd day of April, 1986.

/s/
DUDLEY H. BOWEN, JR., JUDGE
UNITED STATES DISTRICT COURT

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

GORDON C. PERDUE	)	CV 183-059
ELIZABETH T. PERDUE	)	CV 183-069
-VS-	)	
UNITED STATES OF AMERICA)		USCA 85-8445

NAME OF JUDGE OR MAGISTRATE

JUDGE DUDLEY H. BOWEN, JR.

__Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came for consideration before the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That in accordance with the Order of this Court of May 20, 1985, these cases stand dismissed with prejudice.

CLERK	DATE
HENRY R. CRUMLEY, JR.	5/20/85

(BY) DEPUTY CLERK

/s/ Brenda M. McCarthy

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

GORDON C. PERDUE	)	CIVIL ACTIONS
ELIZABETH T. PERDUE	)	CV183-59 and
-VS-	)	CV183-69
UNITED STATES OF AMERICA)		

ORDER

Plaintiffs filed their actions against the United States of America pursuant to the Federal Torts Claims Act. Defendant has filed a motion to dismiss for failure to state a claim and for lack of jurisdiction over the subject matter. Plaintiffs have opposed the motion.

This action arose from a motor vehicle collision that occurred on Fort Gordon Military Reservation. Plaintiff Elizabeth T. Perdue

worked as a civilian employee assigned to the Communication Electronics Board at Fort Gordon, Georgia. On the afternoon of May 7, 1981, Mrs. Perdue had left work and was driving home when her automobile was struck by another motor vehicle driven by David Kesner, a soldier in the United States Army. Mrs. Perdue was injured in the accident.

Defendant argues that the complaints should be dismissed because the plaintiffs' exclusive remedy is the award made under the Federal Employee's Compensation Act (FECA), 5 U.S.C. §§8101 et seq. Section 8116(c) provides that FECA is the exclusive remedy against the United States for an injury within its coverage. Here, the Secretary of Labor has determined that Mrs. Perdue is within the coverage of FECA. "Under section 8128(b) of the Act, that determination is expressly made unreviewable by this or any other court." Gill v. United States, 641 F.2d 195, 197 (5th Cir. Unit A 1981). See also Heilman v.

United States, 731 F.2d 1104, 1109 (3rd Cir. 1982). Whether or not the Secretary's determination is grounded in logic or precedent is of no consequence. Di Pippa v. United States, 687 F.2d 14 (3rd Cir. 1982). This Court is bound by the Secretary's conclusion that Mrs. Perdue's injury fell within the coverage of FECA. Therefore, the Perdues are barred under §8116(c) from bringing any suit against the United States or its instrumentalities for that injury. Gill, 641 F.2d at 197. The Court rejects plaintiffs' argument that they should be able to maintain an action against the United States, not as the employer of Mrs. Perdue, but as the employer of Kesner. Di Pippa, 687 F.2d at 18-19.

In conclusion, the Court GRANTS defendant's motion and orders the cases DISMISSED with prejudice.

ORDER ENTERED at Augusta, Georgia, this 20th day of May, 1985.

/s/ DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-8445

GORDON C. PERDUE Plaintiffs-Appellants,

ELIZABETH T. PERDUE

versus

UNITED STATES OF AMERICA Defendant-Appellee.

- - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Georgia
ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion January 27, 11 Cir., 1986, ___F.2d___).
(April 7, 1986)

Before VANCE and HENDERSON, Circuit Judges, and LYNNE*, Senior District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT.

/s/
United States Circuit Judge
*Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Supreme Court, U.S.
FILED
NOV 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-294

In the Supreme Court of the United States

OCTOBER TERM, 1986

GORDON C. PERDUE AND
ELIZABETH T. PERDUE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-294

GORDON C. PERDUE AND
ELIZABETH T. PERDUE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in holding that a federal employee may not maintain an action under the Federal Tort Claims Act once the employee has sought and obtained benefits under the Federal Employees Compensation Act.

1. Petitioner Elizabeth Perdue, a civilian clerk employed by the United States Army, was injured in an automobile accident on the Army's Fort Gordon, Georgia, military reservation. On the day of the accident, she had been released from work before the end of her normal workday and was driving home when her car collided on the base with a vehicle driven by an Army soldier returning from a party.[1] Mrs. Perdue was seriously injured. Pet. App. A17, A29.

Petitioners, with the assistance of Elizabeth Perdue's work supervisor, then took several affirmative steps to obtain benefits under the Federal Employees Compensation

[1] The Army subsequently determined that the soldier was acting in the line of duty at the time of the accident (Pet. App. A17).

Act (FECA), 5 U.S.C. 8101 *et seq.* First, while still hospitalized for treatment of her injuries, petitioner Elizabeth Perdue signed a Notice of Traumatic Injury form so that she might apply for compensation benefits while away from work (Pet. App. A18). Second, her husband and co-petitioner in this action signed another form for a similar purpose (*ibid.*). Finally, Mrs. Perdue signed additional documents requesting leave without pay status so that she could receive the approved compensation (*ibid*). Her supervisor then filed a compensation claim on her behalf (Pet. 8), and the Secretary of Labor ultimately determined that she should be paid compensation under FECA (see Pet. App. A21 & n.3, A29).

After receiving FECA compensation payments for a period of time (Pet. App. A18), petitioners filed suit against the United States in the United States District Court for the Southern District of Georgia. Petitioners sought damages for personal injuries and property loss under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* The district court held that petitioners' claims were barred by 5 U.S.C. 8116(c), which states that FECA provides the exclusive remedy against the United States for injuries within its coverage (Pet. App. A29-A30). The court reasoned that the Secretary of Labor had determined that petitioner's injuries fell within the scope of FECA and that the Secretary's determination was not subject to judicial review (*ibid.*). Accordingly, the court granted the government's motion to dismiss petitioners' personal injury and property damage claims (*id.* at A30).

The court of appeals affirmed in part and reversed in part (Pet. App. A16-A23). The court held that FECA provides the exclusive remedy once the claimant seeks compensation benefits and the Secretary of Labor concludes that the claimant's injury falls within the coverage of the Act (*id.* at A20-A21). The court noted that petitioners had

sought and obtained compensation under FECA and ruled that the Secretary's decision to pay compensation to petitioners conclusively established that Mrs. Perdue's injuries were covered by the statute (*id.* at A20-A21). Accordingly, the court ruled that petitioners' personal injury claims were barred by FECA and that the district court properly dismissed those claims (*ibid.*). The court of appeals concluded, however, that petitioners' property damage claim was not barred by FECA, and it remanded the case to the district court for further proceedings on that claim (*id.* at A22-A23).

2. Petitioners contend that the court of appeals erred in dismissing their FTCA personal injury suit. That claim was correctly rejected by the court of appeals and does not warrant review by this Court.

The Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.*, was passed by Congress in 1916 to provide workers' compensation coverage to federal employees. The Act, as amended in 1949, provides the *exclusive* remedy against the United States for a federal worker's employment related injuries. It thus expressly states (5 U.S.C. 8116(c)) that:

> The liability of the United States * * * with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States * * * to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States * * * because of the injury or death in a direct judicial proceeding, in a civil action, or * * * under a Federal tort liability statute.

In *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 193-194 (1983), this Court observed that this exclusive liability provision:

> was designed to protect the Government from suits under statutes, such as the Federal Tort Claims Act,

> that had been enacted to waive the Government's sovereign immunity. In enacting this provision, Congress adopted the principal compromise—the "*quid pro quo*"—commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government.

It is thus well settled that if a federal employee's injury falls within the scope of FECA coverage, all personal injury actions arising out of an employment relationship with the United States are barred. *E.g., Heilman* v. *United States*, 731 F.2d 1104, 1109 (3d Cir. 1984); *Griffin* v. *United States*, 703 F.2d 321, 322 (8th Cir. 1983).

FECA also provides that the Secretary of Labor has the "final and conclusive" authority to determine whether a given injury is covered by the Act and that his decision is "not subject to review" by any court (5 U.S.C. 8128(b)(1) and (2)).[2] In light of this clear and unequivocal statutory language, the courts of appeals have held that the Secretary's determination that a particular injury is covered by FECA is not judicially reviewable under any circumstances. See, *e.g., DiPippa* v. *United States*, 687 F.2d 14, 16 (3d Cir. 1982) (FECA coverage determination unreviewable); *Gill* v. *United States*, 641 F.2d 195, 197 (5th Cir. 1981) (Secretary's FECA coverage determination unreviewable, notwithstanding plaintiff's allegation that the Secretary's decision was based solely on the desire to

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[2] 5 U.S.C. 8128(b) provides that (emphasis added)):

> The action of the Secretary or his designee in *allowing* or denying a payment under this [FECA] subchapter is—
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

avoid greater liability under Federal Tort Claims Act). Accordingly, the courts of appeals have uniformly held that whenever an employee applies for and receives FECA compensation benefits, the Secretary's decision to award payments cannot be collaterally challenged in a subsequent FTCA action. *E.g., Grijalva* v. *United States*, 781 F.2d 472, 474 (5th Cir. 1986); *Gill* v. *United States*, 641 F.2d at 197; *Joyce* v. *United States*, 474 F.2d 215, 219 (3d Cir. 1973); *Waters* v. *United States*, 458 F.2d 20, 22 (8th Cir. 1972); *Cobia* v. *United States*, 384 F.2d 711, 712 (10th Cir. 1967), cert. denied, 390 U.S. 986 (1968); *Soderman* v. *United States*, 313 F.2d 694, 695 (9th Cir. 1962), cert. denied, 372 U.S. 968 (1963).

Notwithstanding the unreviewability of the Secretary's FECA coverage determination, petitioners argue (Pet. 13) that Mrs. Perdue was not injured in the course of her duties as a federal employee and therefore was not eligible for FECA benefits under 5 U.S.C. 8102(a). The principal basis for this contention is that petitioner had been released from her duties and was driving home at the time of the accident.[3] If petitioners believe that Mrs. Perdue

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[3] While the merits of this issue may not be judicially reviewed, the Secretary's finding here was by no means unprecedented. Questions concerning whether the injury arose in the course of performing duties as an employee turn on the particular facts of each case. Compare, *e.g., Grijalva* v. *United States*, 781 F.2d at 473 (Secretary found that injuries incurred while driving home from work were compensable under FECA); *Avasthi* v. *United States*, 608 F.2d 1059, 1061-1062 (5th Cir. 1979) (injuries incurred while walking to car on the way home raised a substantial question of FECA coverage); *Concordia* v. *United States Postal Service*, 581 F.2d 439, 441-442 (5th Cir. 1978) (injuries incurred while driving home from work raised a substantial question of FECA coverage); with *Bailey* v. *United States ex rel. Department of the Army*, 451 F.2d 963, 967-968 (5th Cir. 1971) (injuries incurred on way home from work did not raise a substantial question); *United States* v. *Udy*, 381 F.2d 455, 458 (10th Cir. 1967) (same).

should not have received FECA benefits, their remedy is to apply to the Secretary to reconsider his decision to award her compensation. See 5 U.S.C. 8128(a)(1) (Secretary may, on application, terminate compensation benefits); *Grijalva* v. *United States*, 781 F.2d at 474.

Petitioners also err in contending (Pet. 14-15) that the decision below conflicts with *Martin* v. *United States*, 566 F.2d 895 (4th Cir. 1977). *Martin* held that the government's unilateral decision to pay compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) 33 U.S.C. 901 *et seq.*, where the employee "never filed a claim for compensation nor sought an administrative determination of her eligibility for statutory compensation" (*id.* at 898) does not estop the employee from pursuing other remedies.[4] In this case, by contrast, the court of appeals found that petitioners had affirmatively sought to qualify for FECA benefits (Pet. App. A21). The court of appeals distinguished this case from *Martin* on that ground and expressly left open the question whether it would follow *Martin* in a proper case (*id.* at A21 n.2). Moreover, the *Martin* court also recognized that an administrative determination of eligibility would foreclose a subsequent tort suit by a federal employee (566 F.2d at 898 n.4).[5]

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[4] Like FECA, benefits under the LHWCA are the exclusive remedy in those situations where they are available. 5 U.S.C. 8173.

[5] It is thus unclear whether the court in *Martin* based its ruling on the absence of any claim for benefits or on the perceived absence of an administrative finding of eligibility by the Secretary. If the former, *Martin* is plainly distinguishable on the ground that petitioners here clearly filled out the forms necessary to receive FECA benefits, and any claim of involuntariness (Pet. 12-13) of that action should be taken up with the Secretary. If the latter, we think that *Martin* is plainly incorrect, because an administrative determination of eligibility is inherent in any decision to pay benefits.

Finally, petitioners contend (Pet. 15-16) that the court of appeals erred in failing to allow their suit to proceed against the United States under the "dual capacity" doctrine.[6] Petitioners argue that the United States can be held liable in its capacity as employer of the driver of the vehicle that struck Mrs. Perdue. That claim lacks merit. The dual capacity doctrine provides that an employer may be held liable in tort if it possesses a " 'second persona so completely independent from and unrelated to [its] status as employer that by established standards the law recognizes it as a separate legal person.' " *Wright* v. *United States*, 717 F.2d 254, 259 (6th Cir. 1983) (citation omitted).[7] That doctrine does not apply in this case. The fact that the government employs other persons does not invest it with a "second persona" that is completely separate from its role as petitioners' employer.[8] Otherwise, FECA would never apply when one employee is injured by another. The lower courts correctly rejected that claim.

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[6] The court of appeals did not specifically rule on the applicability of the dual capacity doctrine. The district court, however, flatly rejected the argument (Pet. App. A30).

[7] In *Wright*, the plaintiff was an employee of the Veterans Administration (VA) who became ill during working hours. She was admitted as a patient to the VA hospital where she worked, and she was injured during her treatment. The court of appeals concluded that the hospital was serving as her physician, not her employer, at the time of her injuries, and ruled that she could bring suit against the VA under the FTCA. 717 F.2d at 260. This case is readily distinguishable from *Wright*.

[8] Thus, petitioners' reliance (Pet. 16) on *Wallace* v. *United States*, 669 F.2d 947 (4th Cir. 1982), is misplaced. *Wallace* held that the United States could be sued under the FTCA because the United States had assumed liability under the Swine Flu Act of 1976, 42 U.S.C. (1976 ed.) 247b(j)-(*l*), from the manufacturers of the swine flu vaccine. 669 F.2d at 954-955.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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